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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 830

IRENE BRADY, Administratrix of the Estate of EARLE A. BRADY, Deceased,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent

PETITION TO REHEAR, MOTION TO VACATE ORDER DENYING CERTIORARI, AND ACCOMPANYING STATEMENT AND BRIEF OF PETITIONER IN SUPPORT THEREOF—FILED IN CONNECTION WITH PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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C. CLIFFORD FRAZIER,
D. E. HUDGINS,
WELCH JORDAN,
Of Counsel

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TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

PART I. PETITION TO REHEAR AND MOTION TO VACATE ORDER DENYING CERTIORARI.

The petitioner hereby respectfully petitions this Court to rehear this case and moves that this Court reconsider its action in denying, upon limited and qualified grounds, the petitioner's request for a writ of certiorari to review a judgment of the Supreme Court of the State of North Carolina, and that this Court vacate such order. The petitioner expressly renews her request for the writ of certiorari. A certificate of counsel in support of this petition to rehear has been filed with the Clerk and is printed in Appendix I.

PART II. STATEMENT AND BRIEF OF PETITIONER

(1) Introductory Statement

On the 15th day of March, 1943, the petitioner filed with this Court her petition for a writ of certiorari to the Supreme Court of the State of North Carolina. The supporting brief was combined with the petition (Rule 38, Sec. 2). The petition and brief were filed within the required time (Record Supplement: Certificate of Clerk of North Carolina Supreme Court). The combined petition and brief, together with the record, were served upon respondent, which in due course filed its brief in opposition to the petition. A reply brief was filed by the petitioner. On April 19, 1943, this Court entered the following order with respect to this case:

> "The petition for writ of certiorari is denied on the ground that it does not appear from the record or from the papers submitted that the judgment is final. Mr. Justice Black is of opinion that the judgment is final."

A reasonable construction of the foregoing language clearly indicates that this Court is of the opinion that if the judgment which the petitioner seeks to review is final (as required by Judicial Code, Section 237 (b), amended, 28 USCA, Sec. 344), the certiorari jurisdiction of this Court should be exercised. Accordingly, this petition to rehear, motion to vacate, and supplemental statement of petitioner is filed for the sole purpose of demonstrating conclusively to this Court that the judgment of the court below is in fact final, and that, therefore, for the reasons stated in the original petition and supporting briefs, this Court should now exercise its jurisdiction to grant the requested writ.

(2) Judgment Is Final Under North Carolina Law and Finality Is Apparent On Face of Judgment

The judgment (Record Supplement) which the petitioner seeks to review provides: ". . . It is, therefore, considered and adjudged by the Court here, that the opinion of the Court . . . be certified to the said Superior Court, to the intent that the *Judgment is Reversed.*" (Italics supplied).

The opinion of the North Carolina Supreme Court (Record Supplement, page 10) closes with the following sentence: "After careful consideration, we reach the conclusion that defendant's motion for judgment of nonsuit should have been allowed, and that the judgment of the Superior Court must be Reversed."

In the present case the North Carolina Supreme Court itself could have entered the last judgment or could have instructed the trial court to do so, *Rutherford Hospital v. Florence Mills*, 186 N. C. 554, 120 S. E. 212. In actual practice, it followed its standard, routine custom of sending the case to the trial court for the perfunctory entry of a non-discretionary and compulsory decree, which merely implemented the final action taken by the appellate court. (Appendix II). The North Carolina practice is clearly stated in the case of *North Carolina Corporation Commission v. Atlantic Coast Line R. Co.*, 137 N. C. 1 (pp. 20-21), 49 S. E. 191 (p. 199), in the following language:

> "The Court has the power to enter final judgment here, and on proper occasions has done so. The Code, sec. 957; *Alspaugh v. Winstead*, 79 N. C., 526; *Griffin v. Light Co.*, 111 N. C., 438; *Cook v. Bank*, 130 N. C., 184. Final judgment has been entered here, not infrequently, by order and without opinion as a matter of course. In *Bernhardt v. Brown*, 118 N. C., 710, 36 L.R.A., 402, it is said: 'If this Court reverses or affirms the judgment below, it may in its discretion enter a final judgment here or direct it to be so entered below. By preference, and as a matter of convenience, the latter course is, unless in very exceptional cases, the course pursued, especially since the Act of 1887 Chap. 192.' In *Caldwell v. Wilson*, 121 N. C., 473, which resembles this case in being a matter of public interest and not a judgment for money, it was held 'the judgment must therefore be affirmed, but in view of the public interests involved, we deem it proper not to remand the case but to enter final judgment in this Court', which was done—ousting the defendant from the office and seating the relator."

The Superior Court has no power to modify or change a

judgment or decree of the Supreme Court of North Carolina which is certified to the trial court. The power of the trial court is confined to incidental matters of detail necessary to carry the decree into effect, and the judgment of the appellate court "must be treated as final and conclusive in the whole course of the action, and not subject to review or correction by the court below." *Murrill v. Murrill*, 90 N. C. 120 (at p. 124). The procedure is based upon the desire to have the last judgments in cases of this type entered by the court where the original and official records are preserved, i.e., the trial court. In no case in North Carolina (Appendices II and III) is there any provision for, or practice in respect to, certifying back to the North Carolina Supreme Court the record of an implementing judgment entered by the lower court pursuant to the mandate of the appellate court. Therefore, it was and is impossible for the petitioner to obtain from the North Carolina Supreme Court any certification of any judgment entered subsequent in date to the actual *final* judgment of the North Carolina Supreme Court.

It is a fundamental principle of North Carolina procedure that a judgment of nonsuit is a final disposition of the case in which it is entered. The plaintiff is barred from proceeding further in such action. *Tussey v. Owen*, 147 N. C. 335, 61 S. E. 180; *Hampton v. Rex Spinning Company*, 198 N. C. 235, 151 S. E. 266; *Cooper v. Crisco*, 201 N. C. 739 (at p. 742), 161 S. E. 310 (at p. 312). In *Tussey v. Owen, supra*, it was held that upon reversal of a judgment for the plaintiff because of insufficiency of the evidence, the Superior Court was bound to dismiss the action in accordance with the mandate of the final judgment in the appellate court. The trial court possessed no further power to perform any *judicial* act in the action under review.

The petitioner regards the case of *North Carolina R. Co. v. Story*, 268 U. S. 288, 69 L. ed. 959, 45 S. Ct. 531, as direct authority in support of her contention that the judgment of the Supreme Court of the State of North Carolina appears on its face to be a final decree. It is an interesting coinci-

dence that *North Carolina R. Co. v. Story* was before this Court on a writ of certiorari to the Supreme Court of North Carolina to review a judgment affirming a judgment of the Superior Court of Guilford County. In discussing the question of finality of the judgment of the North Carolina Supreme Court Mr. Chief Justice Taft said (at pp. 291, 292 of the U. S. Report): "The affirmance of the judgment of the lower court upon the certified opinion of the supreme court, *left nothing for the Guilford county court to do but to dismiss the petition . . . Such a decree is a final decree* . . . we must assume from the action of the supreme court, and the recital of what was before it, that it intended the Guilford county court, on the coming down of its mandate, to terminate the case by following its opinion." (Italics supplied.) In the instant case the judgment of the North Carolina Supreme Court (to paraphrase the language of Mr. Chief Justice Taft) left nothing for the Guilford county court to do but to dismiss the action. (See Appendix IV). Hence, it is submitted that the decision in the *Story case* should be treated as controlling, and this Court should hold that the judgment of the appellate court below is final in form and substance so as to give jurisdiction to this Court. The judgment of the Supreme Court of North Carolina meets the test of finality defined in the decisions of this Court. *Rio Grande Western R. Co. v. Stringham*, 239 U. S. 44, 60 L. ed. 136, 36 S. Ct. 5. As was said by Mr. Justice Van Devanter in the *Rio Grande Western R. Co. case*, speaking of a decree of the Supreme Court of Utah which reversed a decree of a county court in favor of defendant and directed entry of judgment for the plaintiff, "It disposed of the whole case on the merits, directed what judgment should be entered, and left nothing to the discretion of the trial court . . . it being final in the sense of Section 237 [Judicial Code]. . . ." (at p. 47 of the U. S. Report).

In view of the well established rule of this Court to the effect that finality must be determined from the face of the judgment (*Hartford Accident & Indemnity Co. v. Bunn*, 285

U. S. 169, 76 L. ed. 685, 52 S. Ct. 354; *Haseltine vs. Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 S. Ct. 49), and since under the North Carolina law the procedure supplementing the court's judgment is purely ministerial in character, the petitioner did not deem it necessary to cover this question in her original petition and briefs. The pertinent North Carolina statutes governing the appellate powers of the North Carolina Supreme Court are Sections 658, 659, 1412 and 1417 of the North Carolina Consolidated Statutes of 1919, Michie's 1939 Code. (Appendix III). These statutes conclusively indicate that the judgment in the present case was final, and that the trial court's action upon the North Carolina Supreme Court's decision was ministerial only.

Since this supplemental statement of the petitioner is informal in nature and does not purport to constitute an official record — the official record being limited, of course, to the proceedings in the North Carolina Supreme Court—the petitioner has attached hereto (Appendix IV) an exact copy of the judgment which was in fact entered in this case in the North Carolina trial court upon the opinion and judgment of the North Carolina Supreme Court. This document is printed herein only for the purpose of aiding this Court to determine that the judgment of the North Carolina Supreme Court is final and is the proper subject of review by certiorari., (Judicial Code, Section 237 (b); 28 USCA, Sec. 344.) The original certified copy of the judgment which apears herein as Appendix IV has been filed in this Court with the Clerk.

The *Haseltine case, supra*, contains the following significant observation: "The plaintiffs in the case under consideration could have secured an immediate review by this court, *if the court as a part of its judgment of reversal had ordered the circuit court to dismiss their petition . . .*" (Italics supplied.) In the present case, the ministerial judgment (Appendix IV) entered by the trial court upon the State Supreme Court's mandate expressly provided for *dismissal* of the action, with the result that the *only* remedy available to the plaintiff is her petition to this Court for a writ of certiorari to the North Carolina Supreme Court.

(3) Respondent Has Never Contested Finality of Judgment

It will be observed from a study of respondent's brief that the respondent has never raised the issue that the judgment of the North Carolina Supreme Court was interlocutory or fragmentary. On the contrary, the contention of the respondent (as illustrated by Appendix IV) is that the case is finally terminated. Respondent would never concede that under the judgment of the North Carolina Supreme Court the petitioner is entitled to a new trial or that any further proceedings, other than the ministerial dismissal of the action by the trial court, are proper. In fact the question of the finality of the judgment probably never occurred to the respondent until this Court entered its order in this case on April 19, 1943. The judgment is a typical final decree under the laws of the State of North Carolina, and no North Carolina lawyer or judge would ever contend that any further steps are required to conclude the case, except for the routine and required entry by the trial court of the final judgment of dismissal. (Appendix II).

(4) Supplemental Certificate of Clerk of the North Carolina Supreme Court Establishes Finality of Judgment

There is printed with this petition, motion, and statement (Appendix II) a certificate of Adrian J. Newton, Clerk of the North Carolina Supreme Court. This certificate clearly demonstrates that the judgment which the petitioner seeks to review is final, and that, therefore, this Court may properly exercise certiorari jurisdiction in this case. The original of the supplemental certificate has been filed with the Clerk of this Court.

(5) Time Element Does Not Preclude Issuance of Writ of Certiorari

As indicated above, the petition in this case was filed in ample time. 28 USCA, Sec. 350. It follows that this Court, upon this petition to rehear, may reconsider and revise its order as issued in this case on April 19, 1943. The case is still

before this Court, and the Court possesses adequate power to grant the request of the petitioner, particularly in the light of the facts disclosed in this statement.

(6) Conclusion

For the reasons stated in her original petitions and briefs, and for the additional reasons set forth in this petition and motion, petitioner respectfully submits that this Court should grant this petition to rehear, vacate its order of April 19, 1943, and issue a writ of certiorari to review the decision and judgment of the North Carolina Supreme Court denying to the petitioner rights which have been guaranteed to her under the Federal Employers' Liability Act, as amended, 45 USCA, Sections 51-54.

Respectfully submitted,

JULIUS C. SMITH,
Greensboro, North Carolina,
Counsel for Petitioner.

C. CLIFFORD FRAZIER,
D. E. HUDGINS,
WELCH JORDAN,
Of Counsel.

APPENDIX I
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1942
No. 830

IRENE BRADY, ADMINISTRATRIX OF THE ESTATE OF EARLE A. BRADY, DECEASED,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent.

CERTIFICATE OF COUNSEL

I, Julius C. Smith, Counsel for petitioner, make this certificate in compliance with Rule No. 33 of the Revised Rules of the Supreme Court of the United States (effective February 27, 1939), in connection with the petition to rehear and motion of petitioner to vacate the order of this Court entered herein on April 19, 1943, as follows:

> "The petition for writ of certiorari is denied on the ground that it does not appear from the record or from the papers submitted that the judgment is final. Mr. Justice Black is of opinion that the judgment is final."

I do hereby certify that said petition to rehear is presented in good faith and not for delay, and that, in my opinion, said petition for rehearing should be granted and said order of April 19, 1943 vacated to the end that a writ of certiorari may be issued to the Supreme Court of the State of North Carolina.

IN WITNESS WHEREOF, I have hereunto set my hand on this the 23rd day of April, 1943.

(s) JULIUS C. SMITH,
Counsel for Petitioner.

APPENDIX II

IN THE

SUPREME COURT OF THE STATE OF NORTH CAROLINA

IRENE BRADY, ADMINISTRATRIX OF THE ESTATE OF EARLE A. BRADY, DECEASED

v.

SOUTHERN RAILWAY COMPANY

Appeal docketed 3 August, 1942

Case argued 2 December, 1942

Opinion filed 16 December, 1942

Final Judgment entered 16 December, 1942

Record certified to United States Supreme Court 10 March, 1943

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify that the judgment entered on the 16th day of December, 1942, by the Supreme Court of North Carolina in the case of Irene Brady, Administratrix of the Estate of Earle A. Brady, Deceased, v. Southern Railway Company (said judgment having been entered pursuant to opinion filed on December 16, 1942, in this court in connection with said case) was and is a final judgment under the laws of the State of North Carolina, and that pursuant to the laws of said State it became the mandatory and ministerial duty of the Superior Court of Guilford County, North Carolina, to enter judgment dismissing and terminating said action. I further certify that the record in the above entitled case, as heretofore certified by me on the 10th day of March, 1943, was and is the full and complete record on file in the Supreme Court of North Carolina with respect to said case, there being no provision of the laws of the State of North Carolina for

recordation in the Supreme Court of said State of judgments entered in the Superior Courts of the State pursuant to opinions and judgments of the Supreme Court of North Carolina.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at office in Raleigh, North Carolina, on this the 22nd day of April, 1943.

(s) ADRIAN J. NEWTON,
Clerk of the Supreme
Court of North Carolina.

(Official Seal of the
Supreme Court of the
State of North Carolina.)

APPENDIX III

NORTH CAROLINA STATUTES

(a) Section 658 of North Carolina Consolidated Statutes of 1919 (Michie's Code, 1939).

(b) Section 659 of North Carolina Consolidated Statutes of 1919 (Michie's Code, 1939).

(c) Section 1412 of North Carolina Consolidated Statutes of 1919 (Michie's Code, 1939).

(d) Section 1417 of North Carolina Consolidated Statutes of 1919 (Michie's Code, 1939).

(a) Section 658. *Judgment on appeal and on undertakings; restitution.*—Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment. Undertakings for the prosecution of appeals and on writs of certiorari shall make a part of the record sent up to the supreme court on which judgment may be entered against the appellant or person prosecuting the writ of certiorari and his sureties, in all cases where judgment is rendered against the appellant or person prosecuting the writ.

(b) Section 659. *Procedure after determination of appeal.*—In civil cases, at the first term of the superior court after a certificate of the determination of an appeal is received,

if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first term after the receipt of the certificate from the supreme court.

(c) Section 1412. *Power to render judgment and issue execution.*—In every case the court may render such sentence, judgment and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon; and it may at its discretion make the writs of execution which it may issue returnable either to the said court or to the superior court: Provided, that when an execution shall be made returnable as last mentioned, a certificate of the final judgment of the supreme court shall always be transmitted to the superior court aforesaid, and there be recorded: Provided further, that the said superior court may enforce obedience to the execution, and in the event of its not being executed may issue new or further execution or process thereon in the same manner as though the first execution had isued from the said superior court: Provided, also, that in criminal cases the decision of the supreme court shall be certified to the superior court from which the case was transmitted, which superior court shall proceed to judgment and sentence agreeable to the decision of the supreme court and the laws of the state.

(d) Section 1417. *Certificates to superior courts; execution for costs; penalty.*—The clerk on the first Monday in each month shall transmit by some safe hand, or by mail, to the clerks of the superior courts certificates of the decisions of the supreme court in cases sent from such courts, which shall have been on file ten days; and thereupon the clerks respectively shall issue execution for the costs incurred in the courts from which the cases were sent; and the clerk of the supreme court shall issue exe-

cution for the costs incurred in that court, including all publications in newspapers made in the progress of the cause in that court, and by order of the same, and all postage on letters which concern the transfer of original papers. And if the clerk shall fail for the space of twenty days to perform the duty herein enjoined of transmitting the certificates of decisions, he shall forfeit and pay to the party or parties in whose favor the supreme court shall have decided, one hundred dollars.

APPENDIX IV

NORTH CAROLINA, GUILFORD COUNTY. IN THE SUPERIOR COURT, JANUARY 5, 1943, CIVIL TERM.

IRENE BRADY, ADMINISTRATRIX OF THE ESTATE OF EARLE A. BRADY, DECEASED, *Plaintiff*,

vs.

SOUTHERN RAILWAY COMPANY, *Defendant*.

Judgment Pursuant to Certificate of Decision of Supreme Court.

This cause coming on to be heard and being heard by the Honorable Wm. H. Bobbitt, Judge Presiding, at the January 5, 1943 Civil Term of the Superior Court of Guilford County, and it appearing to the Court that the certificate of the opinion and judgment of the Supreme Court of North Carolina in this cause has been duly received and filed in the office of the Clerk of this Court, from which it appears that a judgment heretofore rendered in this cause in favor of the plaintiff and against the defendant in the sum of $20,000.00 and costs, at the March 30, 1942 Civil Term of the Superior Court of Guilford County, North Carolina, was reversed on the ground that the defendant's motion for judgment of nonsuit should have been allowed:

IT IS, THEREUPON, CONSIDERED, ORDERED AND ADJUDGED That in conformity with the said opinion and judgment of the Supreme Court of North Carolina, the aforesaid judgment in favor of the plaintiff and against the defendant, Southern Railway Company, in the sum of $20,000.00 and costs, be and the same is hereby set aside and vacated; that this action be and the same is hereby nonsuited and dismissed and that the plaintiff be taxed with the costs of said action.

This 15th day of January, 1943.

(s) WM. H. BOBBITT,
Judge Presiding.

To the signing of the foregoing judgment the plaintiff in apt time and in open court objects and excepts, and gives notice of intention to petition the Supreme Court of the United States for a writ of certiorari to the Supreme Court of North Carolina to review a decision and judgment reversing a judgment of the Superior Court of Guilford County in favor of the plaintiff herein.

This the 15th day of January, 1943.

(s) WM. H. BOBBITT,
Judge Presiding.

I, J. P. Shore, Clerk of the Superior Court of Guilford County, North Carolina, do hereby certify that the foregoing is a true, correct, accurate and complete copy of judgment, and accompanying notation, filed in my office on the 15th day of January, 1943, and now of record therein, in connection with the case of Irene Brady, Administratrix of the estate of Earle A. Brady, deceased, vs. Southern Railway Company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office on this the 22 day of April, 1943.

(s) J. P. SHORE,
Clerk of the Guilford County Superior Court.

(Official Seal of the
Clerk of the Superior
Court of Guilford County,
North Carolina.)

dis. p. 3,

SUPREME COURT OF THE UNITED STATES.

No. 26.—October Term, 1943.

Irene Brady, Administratrix of the Estate of Earle A. Brady, Deceased, Petitioner,
vs.
Southern Railway Company.

On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[December 20, 1943.]

Mr. Justice Reed delivered the opinion of the Court.

This case arose under the Federal Employers' Liability Act.[1] Certiorari to the Supreme Court of North Carolina was sought and granted to consider the retroactivity of the last amendment to the Act in conjunction with the contention that there was error in the ruling which held the case improperly submitted to the jury by the trial court. 319 U. S. 777. Our conclusion makes it unnecessary to consider the former problem.

The decedent, Earle A. Brady, was a brakeman. At the time of his death he was employed in that capacity in interstate commerce by the respondent, Southern Railway Company. The accident occurred during a switching movement in Virginia. The freight train upon which decedent was acting as brakeman came north over a main line and passed a switch which led into a storage track running south parallel to and on the east of the main line. There were four other members of the crew—the engineer, the fireman, the flagman and the conductor.

After the entire train passed the switch, it was stopped and backed into the storage track to permit another northbound train to go through on the main line and to pick up twelve cars at the south end of the storage track. After the other train passed, decedent's train, without picking up the storage track cars, pulled out on to the main line, backed southwardly beyond a vehicular grade crossing which passed over the main line and the storage track about one-eighth of a mile south of the switchpoints, left

[1] 35 Stat. 65, as amended; 36 Stat. 291; and 53 Stat. 1404.

the caboose and all the cars except the four nearest the engine on the main line and returned north for the purpose of again backing into the storage track to pick up the storage track cars. After coupling these cars on to the four next to the engine, the intended movement was to pull out again on the main line, back the train southwardly to the cars left on the main line, couple up all the cars and proceed on the journey to the north.

As the engine and four cars backed slowly into the storage track, the decedent was riding the southeastern step of the rear car, a gondola. It was 6:30 A. M. on Christmas morning and so dark the work was carried on by lantern signals. The trucks hit the wrong end of a derailer, located three or four car lengths from the switch, which was closed so as to prevent cars on the storage track from drifting accidentally onto the main line.[2] The contact derailed the cars and threw decedent to instant death under the wheels.

Damages were sought for the alleged negligence of the carrier in failing to furnish a reasonably safe place to work by reason of defects in the track and derailer and, we assume since it was submitted to the jury and passed upon by the Supreme Court of North Carolina, 222 N. C. at 370, by the act of some other employee in improperly closing the derailer after the beginning and before the fatal phase of the switching movement. Further there was a charge of negligence in failing to provide a light or other warning to indicate the dangerous position of the derailer. A judgment for $20,000 was obtained in the Superior Court which was reversed in the state Supreme Court on the ground of the failure of the evidence to support the jury's verdict.

There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. Only by a

[2] A derailer is a small but heavy iron device attached to a rail which opens and closes over the rail by a lever, so as to derail or turn off the track cars approaching the closed derailer from the expected direction. When the derailer is open trains may pass in either direction without interference. A train or car approaching a closed derailer from the unexpected or wrong direction may successfully roll over the obstruction but more probably they, too, would be derailed. The apparatus is not designed when closed to safely permit the passage of cars from the unexpected direction.

uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states. *Western & Atlantic R. R.* v. *Hughes*, 278 U. S. 496, 498; *C. M. & St. P. Ry.* v. *Coogan*, 271 U. S. 472, 474. Cf. *United Gas Co.* v. *Texas*, 303 U. S. 123, 143. It is true that this Court has held that a state need not provide in F. E. L. A. cases any trial by jury according to the requirements of the Seventh Amendment. *Minneapolis & St. L. R. R. Co.* v. *Bombolis*, 241 U. S. 211. But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question. The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. *Western & Atlantic R. R.* v. *Hughes*, *supra*; *Baltimore & Ohio R. R. Co.* v. *Groeger*, 226 U. S. 521, 524. Cf. *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Commissioners* v. *Clark*, 94 U. S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. *Galloway* v. *United States*, 319 U. S. 372; *Pence* v. *United States*, 316 U. S. 332; *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, n. 1; *Anderson, Admx.* v. *Smith*, 226 U. S. 439; *Coughran* v. *Bigelow*, 164 U. S. 301, 307; *Gunning* v. *Cooley*, 281 U. S. 90, 93, note; *Seaboard Air Line* v. *Padgett*, 236 U. S. 668, 673; *Parks* v. *Ross*, 11 How. 362, 373. See IX Wigmore on Evidence, (3d ed., 1940), §§ 2494 *et seq.*

An examination of the proven facts to determine whether they are sufficient to permit a verdict by the jury for the decedent's estate based upon reason is of no doctrinal importance. Every case varies. However, the soundness of the judgment entered in the State Supreme Court depends upon an appraisal of the evidence and, as to this, there is a difference of opinion here. Our conclusion is that there is failure to show in the record any negligence of the carrier from not putting a light on the derailer or by the action of other employees than decedent in closing the derailer.

As to the light, it is nowhere shown that it was customary or even desirable in the operation of this or any other railroad to equip derailers with such a signal. Apparently lights on a derailer are not used on storage tracks where, as at the place of the accident, an automatic block system functions.

Nor do we find any evidence upon which a jury could find negligence of other employees of the carrier in setting the derailer without warning the decedent. On the first backward movement into the storage track, the engineer and fireman were in the engine cab at the front of the train. There is no evidence that either left that position until after the accident. As the entire train passed the derailer then without incident and again upon its exit from the storage track to return to the main line to cut the train, there is no suggestion that the derailer was not open during that part of the movement. As petitioner states, "during switching operations it is the usual rule and custom for the derailer to be kept off the track until the switching operation is completed." This time the switch was closed between the movement just referred to and the return of the engine and four cars to the storage track to pick up the cars waiting transportation.

The evidence shows without contrary intimation that on the first movement into the storage track the twelve cars to be picked up later were south of the crossing and therefore more than an eighth of a mile from the switch. "When the cars or the train was backed into the pass track to let the northbound train pass, I [the conductor] threw the switch and the derailer and then came back to the crossing to await the other movement—to keep from hitting an automobile." "When that movement was made—when they backed out on the main line—I was at this crossing, protecting the crossing. In the backing up movement I protected the crossing and then they cut out the four cars. The engine came over the crossing; cut off somewhere five or six cars south of the crossing. I was not up north of the engine when they cut the cars out. I was back up here. I rode the caboose car back. When they came on down I stayed on the caboose car and Mr. Brady stayed where the four or five cars were. He cut those out. I didn't see him. I was checking on those cars. I had left the caboose. I was not far from those twelve cars so

I left the caboose to check up on the cars. While I was over there I heard the blast of the locomotive engine. I didn't see how the cars were derailed—left the track—nor did I see where Mr. Brady was at that time." Obviously the conductor, in order to get near the twelve stored cars, hopped the caboose at the crossing as it backed up on the main line. The flagman testified that the conductor came back and watched the crossing after the train first backed into the storage track. The flagman also testified that on leaving the caboose after the second train passed he, the flagman, went south to check up on the twelve stored cars and never touched either the switch or the derailer.

The undisputed testimony as to the significant movements of the decedent, Brady, as given by the engineer, follows:

"When we backed into the pass or storage track the first time and got in there to wait for No. 30 to go by, I saw Mr. Brady close the switch and the derailer. Mr. Brady gave me the signal to come back out. He set the derailer not to derail and opened the switch for me to come out and I came on out. Then I pulled out and back down south on the northbound track beyond the crossing. Mr. Brady was on the four cars and I saw him get off these four cars. He rode back north on these four cars 'til he got north of the switch. He got off the car and throwed the switch and got back and signaled me back. From the time I came out of the switch until I came back in there I never seen anybody else in there, other than Mr. Brady."

With the record evidence as to the action of the crew in this condition, it appears obvious that there is nothing to show negligence by any of the other servants of the carrier.

We now turn to the third instance of alleged negligence. This is the existence to the knowledge of the carrier of a rail, opposite the derailer, so worn on top and sides that in the opinion of qualified experts it permitted the thrust of the east wheels of the car, as they rose over the "wrong end" of the derailer, to force the flange on the west wheels over the defective rail and so to derail the cars, when no such derailment would have occurred, "nine times out of ten, if the best type" rail was in use. There is no evidence of the unsuitability of the rail for ordinary use.

Such evidence, we assume, would justify a finding for petitioners, if the defective rail was the proximate cause of the derailment and the backing of the train improperly over the

closed derailer a danger reasonably to be anticipated. As to the likelihood of cars passing over the wrong end of derailers, one witness with ten years experience as a brakeman testified that he recalled three or four instances. Another, the Superintendent of the railroad with 22 years experience said, "It happens very frequently. I would say yes, I have seen it 25 to 50 times." The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause. *Atchison, T. & S. F. Ry.* v. *Toops*, 281 U. S. 351; *St. Louis-San Francisco Ry.* v. *Mills*, 271 U. S. 344, 348; *N. Y. C. R. Co.* v. *Ambrose*, 280 U. S. 486; *Baltimore & Ohio R. Co.* v. *Tindall*, 47 F. 2d 19; *Texas Gulf Sulphur Co.* v. *Portland Gas Light Co.*, 57 F. 2d 801. Cf. *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 566.

The Supreme Court of North Carolina was of the view that striking a derailer from the unexpected direction "was so unusual, so contrary to the purpose" of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient. *Milwaukee, etc. Ry. Co.* v. *Kellogg*, 94 U. S. 469, at 475:

"But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Events too remote to require reasonable prevision need not be anticipated. It was so held as to an intervening embargo after a delay in transit which was caused by negligence. *The Malcolm Baxter, Jr.*, 277 U. S. 323, 334. Cf. *Northern Ry. Co.* v. *Page*, 274 U. S. 65, 74; *St. Louis-San Francisco Ry.* v. *Mills, supra.* Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67. Here the rail was sufficient for ordinary use, and the carrier was not obliged to foresee and guard against misuse of the derailer, even though the misuse occurred as often as the evidence indicated. It was the wrongful use of the derailer that immediately occasioned the harm. Decedent had first closed and then opened the derailer on the first movement. He signalled the train to back into the storage track

just before the fatal accident. Although this misuse of the derailer was an act of negligence, it is mere speculation as to whether that negligence is chargeable to the decedent or another. Without this unexpected occurrence, the adequacy of the rail vis-a-vis a properly used derailer is unquestioned. It was entirely disconnected from the earlier act of the carrier in placing the weak rail in the track. The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.[3]

Affirmed.

[3] See e. g., The Squib Case, 2 W. Bl. 892. Cf. 1 Cooley on Torts (4th Ed., 1932) § 50, n. 25, and collection of cases.

SUPREME COURT OF THE UNITED STATES.

No. 26.—October Term, 1943.

Irene Brady, Administratrix of the Estate of Earle A. Brady, Deceased, Petitioner,
vs.
Southern Railway Company.

On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[December 20, 1943.]

Mr. Justice Black, dissenting.

Twelve North Carolina citizens who heard many witnesses and saw many exhibits found on their oaths that the railroad's employees were negligent. The local trial judge sustained their finding. Four members of this Court agree with the local trial judge that the jury's conclusion was reasonable. Nevertheless five members of the Court purport to weigh all the evidence offered by both parties to the suit, and hold the conclusion was unreasonable. Truly, appellate review of jury verdicts by application of a supposed norm of reasonableness gives rise to puzzling results.[1]

Although I do not agree that the "uniform federal rule" on directed verdicts announced by the Court correctly states the law I place my dissent on the ground that, whatever rule be applied, petitioner sufficiently alleged and proved at least two separate acts of negligence attributable to the respondent railroad

[1] For an enlightening exposition of the uncertainties generated by excessive judicial use of the norm of reasonableness, see Jackson, Trial Practice in Accident Litigation (1930) 15 Cornell Law Quarterly, 194 *et seq.* It was the writer's opinion that there was "a persistent, insidious, and plausible tendency toward uncertainty in everything that legal reasoning touches", and that this tendency was "easier to illustrate than to describe." Had today's decision then been available, it could well have been added to the several decisions which were used as illustrations. Likewise the criticism which the writer directed at these illustrative decisions is exactly applicable to what the Court today, by applying a legal doctrine misnamed "proximate cause", has done to the Federal Employers' Liability Act. For what it has done is to choose "between two lines of public policy. It could not think in the simple terms of the statutory command: it reverted to the complex legal reasoning involving a combination of principles and depending upon multiplied conditions which the statute tried to supersede."

but for which the decedent Brady would probably have escaped death. The first was the act of one of respondent's trainmen in negligently closing the derailer; the second, the act of respondent's maintenance crew in negligently keeping a defective rail opposite that derailer. Proof of either was sufficient in itself to support a jury verdict against respondent under the terms of the Federal Employers' Liability Act.[2]

Negligence in Closing Derailer. A contributing cause to decedent's death was that the derailer was in a closed position at the time the engineer backed the engine and four cars into it. That the derailer should have been open is not disputed. The evidence was sufficient to show that the employee who negligently closed the derailer must have been either the flagman, the conductor, or the decedent. The flagman expressly denied that he closed the derailer, but the conductor made no such denial. Petitioner, although deprived of decedent's testimony, did produce evidence from which the jury could find that it was not decedent who closed it. Testimony established that decedent knew of the existence and location of the derailer, that he was an experienced brakeman, and that he would be aware of the danger of riding a freight car over a closed derailer. From these facts the jury could find that decedent thought the derailer was open since he would not likely have signalled the train over a closed derailer at the peril of his own safety and protection. Cf. *Atchison, Topeka & Santa Fe Railway Co.* v. *Toops*, 281 U. S. 351, 356. A similar inference is not justified as regards the flagman and conductor for the evidence shows that at the time of the accident both were a half mile away and therefore were not imperiled by the decedent's signalling back the train and were not in a position to have prevented the signal.[3]

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2 "Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, . . . or other equipment." 35 Stat. 65, as amended; 53 Stat. 1404; U. S. C. Title 45, § 51.

3 Uncontradicted testimony showed that both the flagman and the conductor were under the duty to operate the derailer in switching operations when the train was long. Here the train was four hundred yards in length. The conductor admitted that he had operated the derailer once during the switching

Having thus brought forth evidence that one of respondent's employees negligently closed the derailer and that decedent was not that employee petitioner had proved a case for the jury. I cannot agree with the view apparently adopted by the Court that the petitioner was required to pin the negligence on a particular one of decedent's fellow employees. No such burden is imposed by the Federal Act. It provides merely that a railroad is liable "for . . . death resulting in whole or *in part* from the negligence of *any* of the . . . employees." (Italics supplied.)[4]

Negligence in keeping defective rail opposite derailer. There was evidence to show that the rail of the pass track opposite the derailer had been used for twenty-six years; that the top of the rail was decayed, rusty, badly worn, and thin; that with bare fingers metal slivers could easily be picked from both sides of the rail; and that some of the cross ties were old, not properly supported by ballast, and sloped toward the defective rail. Petitioner then offered expert evidence, contradicted by respondent's expert evidence, that the derailment would not have occurred but for this defective rail. The Court declines to give any effect whatever to all of this evidence on two stated grounds: (1) That the rail was suitable for ordinary use and the backing of the train improperly over the closed derailer was not "a danger reasonably to have been anticipated"; (2) That the "weak rail" was not the "proximate cause" of the death.

It is difficult to imagine how, except by sheer guessing, or by drawing upon some undisclosed superior fund of wisdom, the Court reaches the conclusion that respondent need not have foreseen that trains would be backed over the wrong end of closed derailers. The evidence of railroad men who had worked on railroads showed it was foreseeable. Doubtless judges know more about formal logic and legal principles than do brakemen, engineers, and divisional superintendents. I am not so certain that they know more about the danger of keeping a defective rail immediately opposite a derailer. The Djvisional Superintendent of the Southern Railway Company, put on the stand by the respondent, testified that trains backed over closed derailers "very

operation, and that he had been in a place where he could have closed it before the engine and four cars backed into it. Not one of the conductor's fellow employees testified as to what the conductor was doing at the time when the derailer must have been closed.

[4] See note 2, *supra*.

frequently." He himself had seen it happen "on 25 to 50 occasions." And undisputed evidence, including photographs, showed that respondent had foreseen this likelihood to the extent that the top of the derailer had a special groove to hold the flange of a wheel as it passed over the back of the derailer. That a train would ordinarily not be backed over a closed derailer except for the personal negligence of the train crew is not determinative of the issue of foreseeability. The standard of reasonable conduct may require the defendant to protect the plaintiff against "that occasional negligence which is one of the ordinary incidents of human life and therefore to be anticipated. . . ."[5] And the mere fact that the negligence of the respondent in placing the weak rail in the track occurred several years before the accident does not establish that the subsequent injury was not foreseeable. The negligent conduct of respondent not only consisted of "placing the weak rail in the track"; it also consisted of keeping the "weak rail" there.

Nor is it easy to comprehend why the defective rail was not the "proximate cause" of the injury. It was the last "link in an unbroken chain of reasonably foreseeable events" which cost the employee his life. Surely this rail was the "proximate cause" if those words be used to mean an event which contributes to produce a result, which is the meaning Congress intended when it made railroads liable for the injury or death of an employee "due to" or "resulting in whole or in part from" the railroad's negligence.[6] The record shows that two expert witnesses with many years of railroad experience testified that the accident was caused by the defective rail. That one of these witnesses on cross-examination stated the derailment would not have occurred "nine times out of ten" if there had been a sound rail hardly justifies a directed verdict against petitioner. The fact of causation is no different from any other fact and does not have to be proved with absolute certainty; ninety per cent certainty should suffice to make it an issue for the jury. That a sound rail would have given the deceased nine chances out of ten to escape death should be enough to give his family and the community the protection which the Act contemplates.

Mr. Justice DOUGLAS, Mr. Justice MURPHY, and Mr. Justice RUTLEDGE concur in this opinion.

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[5] Restatement of Torts § 302, Comment *l*. See also Prosser on Torts (1941) § 37, p. 243.

[6] See Note 2, *supra*.